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Mr Mamasobri bin Useng v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–55 OF 2010(K)
ALAUDDIN PCA, HASHIM YUSOFF AND HELILIAH FCJJ
16 JUNE 2011

C *Criminal Law — Appeal — Appeal against conviction and sentence — Appellant found guilty and convicted for offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') — Whether learned trial judge erred in law in using presumption of possession under s 37(d) of the DDA to invoke presumption of trafficking under s 37(da)*
D *— Whether Court of Appeal had not considered issue on double presumption which amounted to serious misdirection by way of non-direction — Whether it was proper for Court of Appeal to apply proviso to s 60 of the Courts of Judicature Act 1964 — Whether learned trial judge misdirected himself on issue of burden of proof required of defence — Courts of Judicature Act 1964 s 60 — Dangerous*
E *Drugs Act 1952 ss 37(d), (da) & 39B(1)(a)*

This was an appeal against the decision of the Court of Appeal which had affirmed the conviction and sentence imposed by the trial judge against the appellant on a charge of trafficking in dangerous drugs under s 39B(1)(a) of the
F Dangerous Drugs Act 1952 ('the DDA'). The drugs were found by SP1 under the driver seat as well as in a special compartment located in an Isuzu pick-up ('the said vehicle') driven by the appellant. SP1 also testified that the appellant became nervous and panicky and could not drive the said vehicle properly when he was stopped by SP1. In the present appeal, the appellant submitted
G that: (a) the learned trial judge had erred in law in using the presumption of possession under s 37(d) of the DDA to invoke the presumption of trafficking under s 37(da) thereof; (b) the Court of Appeal had not considered the above issue in its grounds of judgment which amounted to a serious misdirection by way of non-direction; (c) it was not proper for the Court of Appeal to apply the
H proviso to s 60 of the Courts of Judicature Act 1964 ('the CJA'); and (d) the Court of Appeal had erred when it failed to recognise that for the learned trial judge to require the appellant to raise 'a reasonable doubt on a balance of probabilities' was so fundamentally wrong in law as it unjustly imposed a higher burden on the appellant.

I

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Although the Court of Appeal did mention in its grounds of judgment that 'notwithstanding the imbroglio of the usage of the statutory presumptions' (by the learned trial judge), it still was of the opinion that there was no error or misdirection in view of the overwhelming evidence. Based on the overwhelming evidence, the Court of Appeal had not erred in applying the proviso to s 60 of the CJA (see paras 12–13).

(2) With regards to the issue of burden of proof required of the defence, the court did not find anything wrong with the approach taken by the learned trial judge as well as that of the Court of Appeal. The learned trial judge had properly referred to the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. In the present appeal, the learned trial judge found that the defence was merely a denial regarding any knowledge of the drugs found in the said vehicle. The appellant's defence of trying to push the blame on one person called 'Mat' was also rejected by the learned trial judge as an afterthought. The learned trial judge also rightly concluded that the appellant knew that he was carrying the dangerous drugs in the said vehicle because he became nervous and panicky and could not drive the said vehicle properly when he was stopped by SP1. In the final analysis, the court could not find any miscarriage of justice in the present appeal. The court therefore had no reason to interfere with the findings of the learned trial judge. Further, the court also held that the Court of Appeal had not acted contrary to the settled principle of justice (see paras 17–20).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Rayuan yang mengekalkan sabitan dan hukuman yang dikenakan oleh hakim bicara terhadap perayu atas tuduhan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dadah tersebut dijumpai oleh SP1 di bawah kerusi pemandu dan di dalam petak khas yang terletak di dalam 'Isuzu pick-up' ('kenderaan tersebut') yang dipandu oleh perayu. SP1 juga memberi keterangan bahawa perayu menjadi gugup dan panik dan tidak dapat memandu kenderaan tersebut dengan betul apabila dia dihentikan oleh SP1. Dalam rayuan semasa, perayu berhujah bahawa: (a) hakim bicara yang bijaksana telah terkhilaf dari segi undang-undang dalam menggunakan anggapan pemilikan di bawah s 37(d) ADB untuk membuat anggapan pengedaran di bawah s 37(da); (b) Mahkamah Rayuan tidak mengambil kira isu di atas dalam alasan penghakimannya yang mengakibatkan salah arahan serius melalui bukan arahan; (c) adalah tidak wajar bagi Mahkamah Rayuan untuk mengguna pakai proviso kepada s 60 Akta Mahkamah Kehakiman 1964 ('AMK'); dan (d) Mahkamah Rayuan telah terkhilaf apabila ia gagal mengakui

bahawa tindakan hakim bicara yang menghendaki perayu untuk mengemukakan 'a reasonable doubt on a balance of probabilities' adalah secara asasnya salah dalam undang-undang kerana ia secara tidak adil mengenakan beban yang lebih tinggi kepada perayu.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Walaupun Mahkamah Rayuan menyebut dalam alasan penghakimannya bahawa 'notwithstanding the imbroglio of the usage of the statutory presumptions' (oleh hakim bicara yang bijaksana), ia masih berpendapat bahawa tiada kesilapan atau salah arah memandangkan terdapat keterangan kukuh. Berdasarkan keterangan kukuh tersebut, Mahkamah Rayuan tidak terkhilaf dalam mengguna pakai proviso kepada s 60 AMK (lihat perenggan 12-13).

(2) Berhubung dengan isu beban bukti yang diperlukan dari pihak pembelaan, mahkamah tidak mendapati apa-apa yang salah dengan pendekatan yang diambil oleh hakim bicara yang bijaksana dan juga Mahkamah Rayuan. Hakim bicara yang bijaksana dengan betul telah merujuk kepada kes *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. Dalam rayuan semasa, hakim bicara yang bijaksana mendapati bahawa pembelaan perayu hanyalah penafian semata-mata mengenai pengetahuan tentang dadah yang terdapat dalam kenderaan tersebut. Pembelaan perayu yang cuba untuk menyalahkan seorang yang bernama 'Mat' juga ditolak oleh hakim bicara yang bijaksana sebagai suatu pemikiran yang terkemudian. Hakim bicara yang bijaksana juga menyimpulkan secara betul bahawa perayu tahu bahawa dia membawa dadah berbahaya di dalam kenderaan tersebut kerana dia menjadi gugup dan panik dan tidak dapat memandu kenderaan tersebut dengan betul apabila dia dihentikan oleh SP1. Dalam analisis akhir, mahkamah tidak dapat mencari apa-apa ketidakadilan dalam rayuan semasa. Oleh itu mahkamah tidak mempunyai sebab untuk mengganggu dapatan hakim bicara yang bijaksana. Selanjutnya, mahkamah juga berpendapat bahawa Mahkamah Rayuan tidak bertindak bertentangan dengan prinsip keadilan yang mantap (lihat perenggan 17–20).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Muhamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 37(d), (da), (h), 39B(1)(a)

Appeal from: Criminal Appeal No 45–06 of 2003 (Court of Appeal, Putrajaya)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the applicant.
Muhamad Abazafree bin Mohd Abbas (Lailawati bt Ali with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

HashimYusoff FCJ (delivering judgment of the court):

[1] This is an appeal against the decision of the Court of Appeal which had affirmed the conviction and sentence imposed by the High Court against the Appellant on a charge of trafficking 23,829g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act').

FACTS OF THE CASE

[2] On 8 November 2001, the appellant, a Thai national, had driven an Isuzu pick-up bearing registration number XF 1369 PTN from Thailand to the Immigration Complex at Bukit Kayu Hitam as the appellant wanted to drive to Kuala Lumpur. The appellant was the sole occupant of the vehicle. The appellant was then stopped by SP1, a Customs Officer, who wanted to conduct a random search on the vehicle. SP1 identified himself and when the pick- up stopped SP1 said that the appellant looked worried and was in a state of panic. SP1 then asked the appellant to move his pick-up forward and reverse it to the green lane for inspection. The appellant was able to reverse the vehicle only after three or four attempts.

[3] Upon inspection of the vehicle by SP1 and two other Customs Officers SP1 found from under the drivers seat a plastic package containing dried leaves suspected to be cannabis. SP1 then put it back. From the right trousers pocket of the appellant, SP1 found a key with a remote control and on being queried the appellant said it was meant for another vehicle. However each time the remote was pressed there would be a sound of 'ketat' coming from the back passenger's seat. Later the pick-up was brought to the Stor Pencegah for a more detailed examination. The subsequent examination of the pick-up revealed that there was a special compartment under the back passengers seat. There were three layers of covering. The first covering which was made of wood was covered with red rubber cloth and could be opened with the automatic remote.

The other two coverings were made of iron sheets. When the three coverings were opened SP1 found 23 plastic packages (exhs P11–P23) all containing dried leaves suspected to be cannabis.

[4] SP3, a mechanical engineer with the Public Works Department, who examined the pick-up at the request of the Customs Department confirmed the petrol tank had been modified in that the tank was divided into two compartments using an iron plate.

[5] All the 24 plastic packages were sent for analysis and the chemist confirmed that they contained cannabis. The total weight was 23,829g.

[6] Learned counsel for the appellant raised three grounds of appeal:

(i) the learned trial judge and the Court of Appeal failed to appreciate the 'double presumption' point;

(ii) the learned trial judge misdirected himself on the issue of burden of proof required of the defence; and

(iii) it was not proper for the Court of Appeal to apply the proviso to s 60 of the Courts of Judicature Act 1964 ('the CJA').

(i) and (iii) the double presumption point and s 60 of the CJA

[7] We will deal with these two issues first as they are quite closely related.

[8] Learned counsel for the appellant submitted that the learned trial judge had wrongfully used the double presumption under s 37(d) and (da) of the Dangerous Drugs Act 1952 ('the Act') read together as can be seen from his grounds of judgment (at p 17 of the appeal record) wherein the learned judge says 'Saya berpuas hati bahawa selepas kes pendakwaan ditutup pihak pendakwaan telah membuktikan kes terhadap tertuduh di bawah s 39B(1)(a) dengan mengguna anggapan di bawah sub-ss (d), (da)(vi) dan (h) s 37 Akta. Tertuduh oleh yang demikian dipanggil membela diri keatas pertuduhan yang dihadapi'. Following the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170, it was submitted that the learned trial judge had erred in law in using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof.

[9] It was also submitted that the Court of Appeal had not considered this issue in its grounds of judgment. It therefore amounts to a serious misdirection by way of non-direction. What the Court of Appeal had referred to in its

grounds of judgment were the presumptions under s 37(da) and 37(h) of the Act, instead.

[10] The learned DPP however replied that the Court of Appeal had considered the double presumption issue. But having evaluated the totality of the evidence the Court of Appeal was satisfied that 'notwithstanding the imbroglio of the usage of the statutory presumptions and having regard to the overwhelming nature of the case for the prosecution, the learned trial judge would have and indeed come to the same decision. In short, on the totality of the evidence the learned trial judge had made a correct decision in convicting the appellant. The decision was based on cogent and admissible evidence and not on ethereal matters. The misdirection if any (of which we are of the opinion that there was none) had not occasioned any miscarriage of justice' (see p 13 of the grounds of judgment of the Court of Appeal).

[11] The effect of the double presumption issue is closely connected to the application of s 60 of the CJA.

[12] We agree with the learned DPP that although the Court of Appeal did mention in its grounds of judgment that 'notwithstanding the imbroglio of the usage of the statutory presumptions' (by the learned trial judge), it still was of the opinion that there was no error or misdirection in view of the overwhelming evidence based on the following findings of facts by the learned trial judge:

> Daripada keterangan pihak pendakwaan terdapat beberapa perkara yang jelas telah dibuktikan:
>
> 1. Tertuduh merupakan pemandu pick-up berkenaan semasa ditahan oleh SP1 tanpa lain-lain penumpang dalamnya;
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> 2. Apabila ditahan dan beritahu oleh SP1 bahawa SP1 adalah pegawai Jabatan Kastam, tertuduh menjadi gelisah dan kelam-kabut;
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> 3. Apabila diminta menggerakkan ke hadapan dan mengundurkan pick-up ke tempat pemeriksaan pertama tertuduh tiba-tiba tidak dapat memandu pick- up berkenaan dengan baik dan perlu cuba tiga atau empat kali;
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> 4. Di tempat pemeriksaan pertama SP1 telah dapati satu bungkusan mengandungi dadah berbahaya di bawah kerusi pemandu;
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> 5. SP1 kemudian dapati satu kunci bersama remote daripada poket kanan seluar tertuduh dan apabila ditanya oleh SP1, 'ini kunci apa?', tertuduh menjawab 'kunci kereta lain';
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> 6. Apabila SP1 tekan remote berkenaan SP1 mendengar bunyi 'ketat' di bahagian tempat duduk penumpang belakang pick-up berkenaan tiap-tiap kali remote ditekan;
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> 7. Pemeriksaan khusus di tempat duduk berkenaan telah menunjukkan bahawa ada compartment khas dibina dalam tangki minyak petrol pick-up yang tersorok

daripada pandangan dengan lapisan pertama kayu disalut dengan kain getah warna merah, lapisan-lapisan kedua dan ketiga yang terdapat kesan-kesan tangki tersebut dipotong;

8. Tempat 23 bungkusan dadah dijumpai jelas diperbuat dengan khas untuk menyorok dadah berkenaan; dan

9. Kesemua bahan-bahan tumbuhan dalam 24 bungkusan yang dijumpai disahkan sebagai genus cannabis.

These findings do have a cumulative effect on the case against the appellant. Such findings carry with it a snow-ball effect that amplified and constitute sufficient evidence to convict the appellant, without having to resort to any of the above mentioned presumptions.

[13] We also find that based on the above overwhelming evidence, the Court of Appeal had not erred in applying the proviso to s 60 of the CJA which provides:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[14] This power of the Court of Appeal has been explained by this Court in the case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 at p 266; [2001] 1 CLJ 381 at p 390 as follows:

As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209; [1996] 1 CLJ 705 exemplifies the general rule, while that in *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265; [1994] 2 CLJ 151 illustrates the exception.

(ii) The burden of proof required of the defence

[15] Learned counsel for the appellant submitted that the Court of Appeal had erred when it failed to recognise that to require the appellant to raise 'a reasonable doubt on a balance of probabilities' was so fundamentally wrong in law as it unjustly imposed a higher burden on the appellant.

[16] Reference was made to the grounds of judgment of the learned trial judge at p 100 of the appeal record wherein His Lordship said:

Bagi kes pembelaan, beban tertuduh di sisi undang-undang adalah untuk membangkit apa-apa keraguan yang munasabah atas imbangan kebarangkalian terhadap kes pihak pendakwaan. (*Muhamad Radhi Bin Yaakob v PP* [1991] 3 MLJ 169 dan *Mat v PP* [1963] MLJ 263.

This view of the learned trial judge was agreed upon by the Court of Appeal. A

[17] With respect, we do not find anything wrong with the approach taken by the learned trial judge, as well as that of the Court of Appeal. The learned trial judge had properly referred to the case of *Muhamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, wherein this court, inter alia, held: B

> Held:
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> (2) where the prosecution relies on available statutory presumptions to prove one or more of the essential ingredients of the charge, the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. C

[18] In the instant appeal, the learned trial Judge found that the defence was merely a denial regarding any knowledge of the offending 24 packages of drugs found in the Isuzu pick-up. The appellant's defence of trying to push the blame on one person called 'Mat' as the person who was the owner of the pick-up and who had lent it to him on the material date whereby he had driven the pick-up from Hatyai together with 'Mat' but 'Mat' had got off the said vehicle before the Malaysian border at Danok was also rejected by the learned trial judge as an afterthought. D E

[19] The learned trial judge also rightly came to the conclusion that the appellant knew that he was carrying the dangerous drugs in the pick-up because he became nervous and panicky and could not drive the said vehicle properly when he was stopped by the Custom Officer (SP1). The fact that the appellant had in his right trousers pocket the key and a remote control which when pressed, triggered a sound 'ketak' from the direction where the special compartment was located had led to the discovery of the offending drugs hidden therein by the Customs Officer upon investigation. F G

[20] In the final analysis, we could not find any miscarriage of justice in this instant appeal. We had no reason to interfere with the findings made by the learned trial judge. Nor had the Court of Appeal acted contrary to the settled principles of justice. H

[21] For the above reasons, we therefore dismiss the appeal. The conviction and sentence meted out by the trial judge are hereby affirmed. I

A *Appeal dismissed; conviction and sentence affirmed.*

Reported by Dzulqarnain Ab Fatar

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